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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

THOMAS G. KOCH,
Petitioner,

Versus

CITY OF HUTCHINSON, KANSAS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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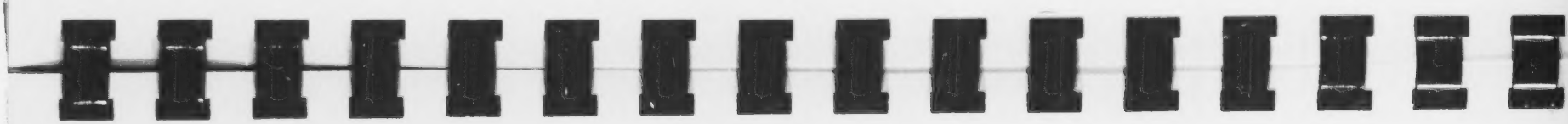

QUESTIONS PRESENTED FOR REVIEW

ISSUE NO. 1: Whether the majority improperly construed its duty, to make an independent examination of the whole record to determine if the speech was protected as a matter of law, as a duty or right to retry "historical" facts and to usurp the jury's decision on the fact issues properly presented to it.

ISSUE NO. 2: Whether the majority improperly conducted the Pickering balance in this case because:

(A) that issue was never raised and such balancing was never requested by respondents before the trial court until after the jury's verdict;

(B) the Pickering balancing should not have been conducted in the absence of a concession by respondents that petitioner's

speech was the substantial or motivating factor in his demotion; (C) by balancing in favor of respondents because:

(i) in doing so the court retried the "historic facts";

(ii) in doing so the court placed undue significance on the fact that petitioner's speech was done in the context of an official report; and,

(iii) in doing so the court found that conduct other than petitioner's speech was disruptive and justified respondents demoting petitioner, whereas Pickering requires that the speech itself be inherently disruptive before the employer can restrict the speech.

ISSUE NO. 3: Whether the majority in fact improperly made a per se rule that speech made as part of official duties or

included in official reports is not protected; or, if this Court agrees that no such per se rule was in fact established, whether the majority erred in placing undue significance on that factor and balancing that factor against petitioner; or in making a rule that that factor should always be balanced against the employee.

ISSUE NO. 4: Whether the majority erred in finding that petitioner's speech -- made in an official report and constituting a finding that a fire which resulted in the death of an unattended small child was the result of arson -- was not a matter of public concern, and therefore not protected as a matter of law.

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Speech Was The Substantial Or Motivating Factor In His Demotion; (C) By Balancing In Favor Of Respondents Because: (i) In Doing So The Court Retried The "Historic Facts"; (ii) In Doing So The Court Placed Undue Significance On The Fact That Petitioner's Speech Was Done In The Context Of An Official Report; And (iii) In Doing So The Court Found That Conduct Other Than Petitioner's Speech Was Disruptive And Justified Respondents Demoting Petitioner, Whereas Pickering Requires That The Speech Itself Be Inherently Disruptive Before The Employer Can Restrict The Speech.

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[1]/The parties herein are: Thomas G. Koch; City of Hutchinson; and, former defendants: Dallas Jones; George Pyle; Joan Schrag; Bill Bornholdt; Ralph Gingrich; John Corey; and, Dan Robinson. The League of Kansas Municipalities, Topeka, Kansas, appeared as amicus curiae before the Tenth Circuit. See Rule 21.1(b).

OPINIONS BELOW

On September 2, 1983, a special verdict was entered in favor of petitioner, finding that his protected speech was the substantial or motivating factor for his demotion; that plaintiff would not have been demoted but for such protected speech; that the City of Hutchinson, Kansas, was liable for the demotion; and that the then remaining defendants (Pyle and Jones, City Manager and Fire Chief) were not liable for the demotion and had acted in good faith; and awarding plaintiff actual damages of $100,000.00.

On October 19, 1983, the trial court granted defendant City's motion for judgment notwithstanding the verdict, finding that plaintiff's speech was not protected. On November 2, 1983, the trial court denied petitioner's motion to amend or alter that judgment.

On March 27, 1987, a 3-judge panel of the Tenth Circuit Court of Appeals reversed the trial court's order granting defendant City's motion for judgment notwithstanding the verdict, finding that petitioner's speech was protected, with a dissenting opinion. On April 29, 1987, rehearing en banc was granted to the City. On June 2, 1988, the Tenth Circuit majority reversed the 3-judge panel's decision and affirmed the trial court's order granting judgment notwithstanding the verdict, with a dissenting opinion.

GROUNDS FOR JURISDICTION

This petition results from a decision by the Tenth Circuit Court of Appeals, on rehearing en banc, reversing a majority opinion of a 3-judge panel of that court, with a dissenting opinion on rehearing. The en banc majority upheld the trial court's order granting respondents' motion for judgment notwithstanding the verdict.

A copy of the en banc decision of the Tenth Circuit Court of Appeals, dated June 2, 1988, is found at **APPENDIX "A"**. The order of the Tenth Circuit granting rehearing en banc, dated April 29, 1987, is found at **APPENDIX "B"**. A copy of the 3-judge panel of the Tenth Circuit Court of Appeals, dated March 27, 1987, is found at **APPENDIX "C"**. A copy of the order of the trial court denying petitioner's motion to amend or alter judgment, dated November 2, 1983, is found at **APPENDIX "D"**. The memorandum and order of the trial court

granting respondent City of Hutchinson's motion for judgment notwithstanding the verdict, and setting aside the jury's verdict in favor of petitioner, dated October 19, 1983, is found at **APPENDIX "E"**. The special verdict of the jury, dated September 2, 1983, is found at **APPENDIX "F"**.

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. Section 1254(1). And, review is sought pursuant to Rule 17(a) of the Rules of the Supreme Court. The en banc decision of the Tenth Circuit, with two of its members dissenting, coupled with the 3-judge panel decision, reflects a conflict within the Tenth Circuit, requiring resolution by this Court. And, the majority decision is in conflict with this Court's decisions in Rankin v. McPherson, 107 S.Ct. 2891 (1987); Connick v. Myers, 461 U.S. 138, 142 (1983); and, Pickering v. Board of Education, 391 U.S. 563 (1968).

STATEMENT OF THE CASE

Petitioner Thomas G. Koch (hereinafter "Koch") went to work for the fire department of the City of Hutchinson, Kansas, when he was 21 years old, and worked there for 19 years. He became Fire Marshal in 1976. This action arose as a result of Koch's demotion from the position of Fire Marshal.

On May 11, 1979, Koch investigated a fire in which a two-year-old child burned to death. Koch submitted a report concluding aggravated arson was the cause of the fire. This conclusion was widely discussed and debated within the fire department, and between the Fire Chief (Jones), the County Attorney (O'Sullivan), and the press and public. O'Sullivan did not agree with Koch's finding. When Koch would not change that finding, O'Sullivan brought in the KBI to investigate the fire, and later Koch; brought in a Hutchinson

Police Detective (Snell) to investigate Koch; solicited reports from Koch's two subordinates (fire inspectors Boesch and Hill) saying the fire was accidental; became hostile toward Koch; and ultimately wrote a letter to Jones, Koch's boss, accusing Koch of withholding evidence and being uncooperative, and indicating he would not work with Koch in future cases. As a result, Koch was demoted from Fire Marshal to fire inspector.

On May 11, 1979, as part of their official duties, Koch and two fire inspectors (Boesch and Hill) investigated the fire. Koch spent 68 hours on his investigation; his investigation included a thorough survey and exam of the house after the fire, taking photographs, directing that drawings of the interior of the house be made, and interviewing 15 witnesses.

At the outset of the investigation Koch followed a rule of investigators that you presume that the fire is accidental

until it is proven otherwise. On May 11, at the scene of the fire, Koch issued a preliminary statement to the press that there was no sign of foul play. As the investigation continued, Koch began to determine that the fire resulted from arson. The primary reason that Koch ultimately reached this conclusion was because an examination of the remains of the fire revealed four points of origin for the fire.

As Koch progressed with his investigation, he considered various alternatives for the cause of the fire. This included information given by the mother of the child that the electrical wiring in the house was poor; and, evidence indicating that the fuses were overloaded. The possibility of an accidental electrical fire was ruled out, however, because four points of origin were inconsistent with that cause. Koch also considered the possibility that the fire

resulted from a broken gas valve. Again, he ruled out this possibility because of the four points of origin.

Early in the investigation process Koch conferred with Jones about sending various items of physical evidence to a local lab (instead of an out-of-town lab which was the usual practice). Jones agreed, because the results could be obtained more quickly; and, the gentleman at the local lab was a metal expert and the evidence to be examined included copper wiring and a brass valve.

On May 22, 1979, Koch picked up the lab report and the ten items of physical evidence given to the lab for review. Upon returning to his office a few minutes later, Koch found Maudlin, a KBI investigator who had been assigned to the fire by O'Sullivan, waiting in his office. Koch told Maudlin that he had the lab report, laid the report on the table in front of Maudlin, and set the sack of

physical evidence on the floor. Maudlin asked Koch if there was anything significant in the report. Koch told Maudlin that the report described a break in the gas valve, and indicated that it was a possible source of the fire. Koch then went on to explain to Maudlin in detail his view that the fire resulted from arson--and not from the broken gas valve--because of the evidence showing four points of origin. Maudlin briefly looked through the report and declined to go through the sack of physical evidence, which included the gas valve. Maudlin did not ask for a copy of the lab report. The lab report was placed in the original official file of the fire department pertaining to this investigation.

In the meanwhile, shortly after the fire, O'Sullivan told a Hutchinson Police Detective (Toland) that the parents of the child could not be charged with endangering a child because that statute had been

stricken by the Kansas Supreme Court. O'Sullivan was wrong; the portion of the statute addressing endangering a child had not been declared unconstitutional. O'Sullivan told Toland to report to Koch that the statute was no longer valid; and, O'Sullivan told Toland to report to Koch that the other possible crimes which may come into play included homicide, voluntary manslaughter, arson or aggravated arson.

On May 15, 1979, Koch had a conversation in the morning with the three fire inspectors at the Hutchinson Fire Department (Boesch, Hill and Tipton). Boesch and Hill told Koch they believed the fire was accidental. Koch told all three of these gentlemen that it was starting to look like arson. Koch told Boesch and Hill he wanted them to continue working on the investigation, and that later in the week they would critique the fire. The critique took place a few days later. It was used to test the different views about the cause

of the fire. The two inspectors were unable to state a cause, but they believed it was accidental.

On May 18, 1979, Koch ran into O'Sullivan in the law enforcement center in Hutchinson. Koch told O'Sullivan that the case was starting to shape up as arson. O'Sullivan became irritated and chastised Koch about how hard it was to prove arson. Koch responded that he realized it was hard to prove; and, that he did not like to have to lay it in O'Sullivan's hands, but that it was his job to determine the cause of the fire and O'Sullivan's job to prosecute the offender. Koch concluded by telling O'Sullivan that his report would be forthcoming and he would go over it with him.

After this conversation with Koch, O'Sullivan went to KBI agent Maudlin and instructed Maudlin to do an investigation into the fire. O'Sullivan said he did this because he did not agree with Koch's

opinion that the fire resulted from arson. O'Sullivan based his disagreement solely on the view of Hutchinson Police Detective Toland. Toland was not a fire investigator; and, he had only spent a very short period of time at the scene of the fire (set up against the many hours that Koch had spent at the scene). Toland and Maudlin conducted their investigation by talking to Koch three times, on May 22, May 23 and May 30. On each occasion, Koch spent several hours going over the details of the evidence, explaining why he ruled out various possibilities for the fire, and his opinion that the fire was arson. A considerable amount of his discussion centered on the four points of origin, how he determined they existed, and why they pointed to arson. Toland and Maudlin did very little investigation beyond these conversations with Koch; and, they did no further investigation after May 30, 1979.

On May 24, 1979, Koch finalized his report. His finding was aggravated arson. He closed the report by stating that he had made all reports and underlying documents and evidence available to Maudlin and Toland; and, that they were available to anyone else with questions or with a desire to view them. Neither O'Sullivan, Maudlin nor Toland ever asked to see any of the file; nor did they ever do any follow up investigation or interview.

In his May 24, 1979 report, Koch specifically addressed the issue of the gas valve: "The possibility of a gas leak causing four physically separate fires is also not logical. Signs from the fire pattern indicated fire burning to the furnace rather than from it. Gas was indeed a fuel after the roof collapsed prior to being shut off by firefighters; line severed when roof fell. Not even the torch effect of the severed line could result in the widely separate damage incurred."

Throughout the trial, respondents claimed that Koch was demoted, in part, because he withheld evidence of the broken gas valve. And, O'Sullivan claimed that Koch told him that the lab report on the gas valve was negative. Koch's report, however, referred to the valve; Koch showed the lab report to Maudlin; and, Koch told O'Sullivan he had taken the valve to the lab, and that the lab had done a report; but that he did not believe the broken valve caused the fire because of the four points of origin he found. There were various other items of evidence through the trial supporting Koch's position that the lab report was referred to often, and in no way hidden or withheld. The jury, by its verdict, obviously believed Koch's version, rather than respondents'.

When Koch had his report finalized, on May 24, 1979, he hand carried it to O'Sullivan's office. He left word with O'Sullivan's secretary that he would like

to talk to him about the report. Between May 24 and May 29, 1979, Koch left several messages (by phone and in person) requesting that O'Sullivan call him. O'Sullivan never called him; O'Sullivan stated at trial that he did not agree with Koch's conclusion and that he did not want to talk to Koch about the file, his report, or his opinion. O'Sullivan intentionally ignored Koch's requests that he call him to talk about the report.

Instead of contacting Koch about the report, O'Sullivan went to Jones and asked him to order Boesch and Hill--both subordinates of Koch--to each prepare their own reports reflecting their opinion that the fire did not result from arson. Boesch and Hill did so, and provided those reports to O'Sullivan.

By May 29, 1979, Koch was quite concerned that he could not communicate with O'Sullivan about his report. He was also concerned that O'Sullivan bypassed him

to get reports from Boesch and Hill. It was very unusual to seek reports from subordinates, or from any person other than the person in the fire department with primary responsibility for the fire investigation (in this case Koch). Koch spoke to Jones about his concerns. Jones suggested that he and Koch should talk to the City Manager (Pyle) about the matter. Koch and Jones went to Pyle together. Pyle agreed that it would be good for O'Sullivan and Koch to sit down and talk. Pyle told Jones to arrange such a meeting. A meeting was set for May 30, 1979. Koch understood the meeting was to take place between him and O'Sullivan only. Instead, when Koch arrived at the meeting, Maudlin and Toland were also present. Even though Koch did not understand why Maudlin and Toland were still unclear on the reason for the arson conclusion (after his lengthy discussions with them on May 22 and May 23), Koch spent two hours going through all of the points

of the investigation again. He again discussed the gas valve, the bad electrical wiring, and why he ruled those out as the source of the fire. He again explained that the four points of origin indicated that the fire was set intentionally, and did not result from the broken gas valve or bad wiring. Koch left the meeting with the understanding from O'Sullivan that there was no more question about his arson finding; and, that the question that would be investigated next was "who did it". The meeting ended on a warm and friendly note.

From May 30 through July 11, 1979, Koch was not questioned by anyone about the case. He was not asked for any information. And, no further investigation was conducted by O'Sullivan, Maudlin or Toland.

On July 11, 1979, Jones told Koch that Hutchinson Police Detective Snell came to him asking to see the fire department's file on this case. Snell said he was

investigating Koch's report at O'Sullivan's instructions. Jones allowed him access to the file. The file had been available throughout this time period for review by O'Sullivan, Maudlin, Toland, or anyone else within these law enforcement agencies interested in seeing the back up evidence, reports, and information about Koch's investigation. Until July 11, none of these agencies, through any representative, asked to see the file, or showed any interest in reviewing the fruits of Koch's investigation.

On July 12, 1979, Koch was told to meet with Snell at the Hutchinson Law Enforcement Center. When Koch arrived, Snell said he wanted to talk about the lab report. Snell was very critical of Koch, saying that the investigation was poorly handled, and that this was the worst report he had ever seen. Both men lost their temper; both men raised their voice; Snell ordered Koch from his office. Without

Koch's knowledge, Snell tape recorded the conversation. When Koch learned that he was taped, he asked for a copy, and it was never given. It was not produced at trial.

At trial, respondents claimed that Koch was demoted, in part, because he refused to cooperate with the other law enforcement agencies; and was belligerent in his dealings with them. The record reflects, however, that O'Sullivan never sought information from Koch; indeed, he ignored Koch's requests and efforts to communicate. And the record reflects that when Koch was approached by any other agency with questions about Koch's investigation, or the fire, Koch responded by thoroughly answering all questions, in detail. Indeed, through the time period from May 18 through May 30, Maudlin had several long conversations with Koch; following those conversations, he wrote lengthy reports, setting out many of the details Koch gave him; those reports were

copied to O'Sullivan contemporaneously. After May 30, no information was sought from Koch; and, in fact, Koch was not approached by anyone about the fire or his investigation. Thus, there was no occasion for him to be uncooperative. And, the only evidence of any unpleasant exchange at all was the temper flare by Koch and Snell at the July 12 meeting, where Koch finally lost patience with the fact that instead of seeking the offender, the law enforcement agencies kept coming back and picking at his report and techniques and conclusion. Again, the jury heard both versions of each of these meetings, conversations, and incidents, from May 11 through July 23, 1979; and, the jury obviously did not believe the City's version, and obviously did believe Koch's version.

On July 13, 1979, O'Sullivan directed a letter to Jones, criticizing Koch, making allegations against Koch, and concluding that he would no longer work with Koch. On

July 16, 1979, Jones gave Koch a suspension letter and took his keys. On July 20, 1979, Jones interviewed Koch, at length. Koch explained again all he had done in the process of his investigation. Koch addressed charges that he withheld the lab report about the gas valve. Koch pointed out that he told everyone about the lab report and about the cracked gas valve; and, that he still ruled out the valve as the cause of the fire because of the four separate points of origin. Koch pointed out that rather than investigating to find out who committed the crime, O'Sullivan was causing Koch to be investigated. On July 23, 1979, Koch was demoted to fire inspector, with a pay reduction.

The press was informed of the disagreement within the department by O'Sullivan. The day after Koch's May 24 report was delivered to O'Sullivan, O'Sullivan told a reporter that Koch thought it was arson; that he was not

comfortable with the conclusion; that he had two other opinions saying it was not arson; that he was trying to work out the disagreement; and, that for the time being, the cause of fire should be published as undetermined. O'Sullivan claims that at the May 30 meeting Koch criticized him for this, saying that O'Sullivan was trying to cover up the fact that he found arson. On June 5, 1979, O'Sullivan issued a statement that the fire was accidental and he was closing the case. To this date, no one has ever been prosecuted for aggravated arson or arson due to this fire and the death of this child.

Respondents claimed through discovery and trial that Koch was not demoted because of his finding of arson. Rather, respondents claimed that Koch was emotionally involved in the case; that when he learned the parents would not be prosecuted for endangering a child, he switched his finding from accidental fire

to arson; that he withheld the evidence of the broken gas valve from O'Sullivan; that he was belligerent and uncooperative toward Maudlin (KBI), Toland and Snell (HPD) and O'Sullivan; and that he had disobeyed orders by Jones that he stay away from Boesch and Hill while they were writing their independent reports.

Respondents did not claim that Koch's speech was inherently disruptive, requiring his demotion. Instead, they claimed his speech was not the cause of his demotion, but that his actions other than his speech caused his demotion.

There were numerous fact disputes at trial. The trial lasted for nearly three weeks. The transcript contains some 2,500 pages; and, some 26 witnesses testified. The jury obviously did not believe respondents when they claimed that Koch withheld evidence, was uncooperative, disobeyed Jones, and so forth. Instead, the jury believed that Koch was demoted

because of his speech in the report, when he found that the fire resulted from aggravated arson.

After some unsuccessful state court litigation, Koch filed suit in federal court on October 29, 1979. He asserted due process and free speech claims. A pretrial conference order was filed March 9, 1982. In the pretrial order, respondents maintained that Koch was demoted due to his misconduct in withholding evidence and not cooperating; not due to his speech. Respondents did not claim that Koch's speech was disruptive and that they were entitled to judgment under the Pickering balancing.

Jury trial was commenced on August 15, 1983, and ended on September 2, 1983, on Koch's First Amendment claims. On August 25, 1983, a directed verdict was granted to the five city commissioners. On August 25, 1983 and August 31, 1983, a motion for a directed verdict by the city, on the

grounds that the speech was not protected, was overruled.

At Instruction No. 14 the jury was instructed: "The following portion of the May 24, 1979, Fire Investigation Report is speech protected under the First Amendment: 'It is my opinion this was an aggravated arson fire.'" At Instruction No. 15, the jury was instructed that to find for Koch they must find that the protected activity he engaged in was the "substantial factor" or the "motivating factor" in respondents' decision to demote him. And, if Koch demonstrated that his protected activity was the "substantial" or "motivating" factor in his demotion, the burden then shifted to the City to demonstrate by a preponderance of the evidence that the same decision would have been made even in the absence of the protected activity Koch engaged in. "Ultimately, to find for the plaintiff against any of the defendants you must find that his protected activity,

freedom of speech, to wit: 'It is my opinion this was an aggravated arson fire.' was the substantial or motivating factor of his demotion."

On September 2, 1983, the jury returned a special verdict accompanied by special interrogatories. The jury found defendants Pyle and Jones not liable. The jury found the City of Hutchinson liable for abridging Koch's First Amendment rights to freedom of speech. The jury found that Koch proved that the protected portion of his May 24, 1979, report was the substantial or motivating factor for his demotion.

On September 12, 1983, respondent City filed a motion for judgment notwithstanding the verdict. The trial court granted the motion and entered judgment in favor of the City. The trial court found that Koch's speech was not protected because it was made in the course of an official report which was part of his official duties. The

trial court relied primarily on a Tenth Circuit case, Schmidt v. Fremont County School District, 558 F.2d 982 (10th Cir. 1977). The trial court said that Koch was not commenting as a citizen upon a matter of public concern, but rather as an employee issuing an internal report in the course of his official duties. After a motion for reconsideration was denied, Koch appealed.

On March 27, 1987, a 3-judge Panel of the Tenth Circuit rendered an opinion. (One member was a Colorado federal district judge sitting by designation.) The opinion was split, 2-1. The majority reversed the trial court on the protected speech issue. See Koch v. City of Hutchinson, 814 F.2d 1489, 1497-1499 (10th Cir. 1987). The majority held that this case was not like Connick where the employee was complaining about her own personnel situation. Rather, the majority reasoned, this case is more like Pickering, where an employee commented

on matters about his employer, but not pertaining to his own personal personnel situation, that were, by their nature, matters of public concern. The majority noted that unlike Connick, the speech here was of public import in evaluating the performance of the City's elected officials. And, unlike Connick, the speech here was not motivated by personal interest. "Koch's objective was to inform his superiors of what he believed to be arson and then the public of what he believed was defendants' misfeasance." Koch, supra, 814 F.2d at 1498.

The dissenting opinion relied upon the Schmidt case, concluding that the report was part of Koch's duties, and, therefore, not a matter of public concern. See Koch, supra, 814 F.2d at 1499-1501. The dissent reasoned that Koch's speech was part of his duties as an employee of the City. "The record does not in any way indicate that plaintiff intended the report to be

anything other than the ordinary exercise of his routine duties within the fire department although the matter was serious." Koch, supra, 814 F.2d at 1499.

On April 29, 1987, on the petition of the City, rehearing en banc was granted. On June 2, 1988, an opinion was rendered on rehearing en banc. The majority reversed the 3-judge panel; the opinion included two members of the Court dissenting.

The majority held that it was entitled to review the question of whether the speech was protected, and the question of the Pickering balancing test, de novo. The majority re-weighed the facts, and set out its own facts, upon which its decision was based. The facts recited by the majority are the opposite of what the jury found.

The majority also held that it would not establish a per se rule that any speech made in an official report was unprotected as a matter of law. "Nonetheless, it is a significant factor which may frequently

lead to a finding that speech is unprotected, because, as we discuss more fully infra when we conduct the Pickering balancing in this case, speech in the course of an employee's duties will usually, if not always, reflect upon the employee's competence to perform his or her job. "Appendix"A", pp.15-16. Emphasis theirs.

The majority also held that the speech was not protected as a matter of law. The majority reached back into the discovery record, found a sliver of Koch's testimony, and concluded from that that Koch's motive was to find improprieties by City officials to reveal in a lawsuit. And, the majority held that the fact that the speech was made in an official report was a factor weighing against finding the speech to be protected. And, the majority held that Koch's speech was not calculated to inform or alert the public about the government's discharge of its duty to investigate the fire.

The majority held that the Pickering balancing "clearly tips in favor of the employer, the City". Appendix "A", p. 34. In making this finding, the majority accepted the claims of respondents--that Koch withheld evidence and was uncooperative--as though those claims had not been rejected by a jury. Further, in making this finding, the majority found that Koch's behavior was disruptive; but, the majority did not find that Koch's speech (finding aggravated arson) was inherently disruptive. Numerous fact findings were made, as though there was no evidence to the contrary, and as though those facts were uncontroverted.

A short concurring opinion was written by Judge McKay. A dissenting opinion was written by Judge Logan, joined by Judge Seymour. The dissent notes that the majority "unjustifiedly supplants the jury's verdict with its own view of the evidence, in order to conclude under the

Pickering test that the [City's interest outweighed Koch's interests]". Appendix "A", dissenting opinion, p. 1. The dissent also notes that rehearing was limited solely to whether the speech was protected; and, it was not granted on the Pickering issue.

The dissent also notes that Koch's speech was not on a personal matter; instead, it stated that he believed a fire which claimed the life of a child had been deliberately set. And, the dissent notes that when law enforcement officials disagree about how a fire started, the public should know about this to assess the conduct of government officials. And, the dissent notes that just because Koch spoke in an official report, that does not mean his speech is "of less value to 'informed decision-making by the electorate'". Appendix "A", dissenting opinion, p. 4. The dissent notes that the majority's opinion "places government employees whose

duties require conclusions on issues of intense public concern in an untenable position". Appendix "A", dissenting opinion, p. 5. The dissent noted that this holding places pressure on public officials not to report unpopular conclusions.

The dissent also noted that since the majority concluded that the speech was not of public concern, it should have ended the inquiry, rather than proceeding with a Pickering balancing. And that the majority "provides no rationale for assigning the presumption against the employee" when the speech is made in an official report. Appendix "A", dissenting opinion, p. 7. "[A]nd as a general proposition the fact that the speech is contained in an official report should weigh in favor of the employee under Pickering." Id. The interest of the employer should be in promoting truthful and accurate reports; not in placing a fire marshal in a position of being demoted simply because he reaches

an unpopular conclusion. And, that the majority ignores the governmental interests in protecting speech in official reports and "looks only at the 'disruptive' aspects of Koch's statement". Appendix "A", dissenting opinion, p. 8. And that the test under Pickering requires the court to determine whether the particular speech is inherently disruptive in the work place. Finally, that the court "must be careful not to go too far and determine issues that are properly for the factfinder". Appendix "A", dissenting opinion, p. 9. "If the evidence were as one-sided as the majority states it, then the majority's Pickering analysis might be correct. But this is not an open and shut case. Rather, the majority overlooks those parts of the record that support the jury's verdict." Appendix "A", dissenting opinion, p. 10.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner requests that the writ issue pursuant to Rule 17.1(b) and (c); generally, because the majority's opinion is in conflict with other opinions within the Tenth Circuit; and, the majority's opinion is in conflict with the opinions of this Court.

Reasons the writ should be allowed are contained in large part in the dissenting opinion. The entirety of that opinion is incorporated into Petitioner's arguments here. Additional reasons are set forth below.

I. The Majority Improperly Construed Its Duty, To Make An Independent Examination Of The Whole Record To Determine If The Speech Was Protected As A Matter Of Law, As A Duty Or Right To Retry "Historical" Facts And To Usurp The Jury's Decision On The Fact Issues Properly Presented To It.

The majority correctly notes that this Court has directed that in a First Amendment government employee case "an appellate court has an obligation ... to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'", citing Rankin, supra, 107 S.Ct. at 2897 n. 9. And the majority notes that this question is one of law.

Petitioner submits that in fulfilling its duty to examine the whole record to be sure that the speech was protected, the majority went too far in re-weighing the facts. As the dissent notes, at pp. 9-13 of its opinion, there are numerous underlying fact disputes which were presented to a jury for determination. And, the dissent notes that in reaching its conclusions, the majority opinion ignored these jury findings, and substituted its own findings for those of the jury. Even

though this is ultimately a legal question, to be reviewed de novo by the appellate court, petitioner submits that there are numerous fact issues intertwined, and it is improper to ignore fact determinations by the jury on those issues in conducting that review. In other words, the facts, on appeal, should be viewed in the light most favorable to the petitioner, when this review is made.

This issue is somewhat confused in the record, because as will be discussed under Issue II below, the majority glides back and forth between a statement of the Pickering balancing, on the one hand, and what was actually respondents' proffered legitimate basis for the demotion, on the other hand. The majority confused these two concepts which only heighten its error in weighing the facts. In other words, not only did the majority retry the facts; but the majority also undertook the wrong fact inquiry under Pickering. The question it

should have addressed is whether Koch's speech was inherently disruptive. The question it improperly addressed was whether Koch's conduct--**other than his speech**--was improper (in this case allegedly disruptive), and warranted the demotion.

The Tenth Circuit has addressed the proper manner in which it should carry out its duty of independent constitutional review, in the context of a motion for directed verdict, in a first amendment government employee case. In Saye v. St. Vrain Valley School Dist. RE-1J, 785 F.2d 862, 865 (10th Cir. 1986), the court noted that in Connick this Court pointed out that the inquiry into the protected status of speech is one of law, not fact, and that a district court's views on this issue are therefore not subject to the clearly erroneous standard of review. And, that an appellate court must make an independent constitutional judgment on whether, under

the particular circumstances, the statements at issue are constitutionally protected. The court then stated: **"However, the underlying historical facts upon which the constitutional claim is grounded are subject to the traditional standards of review governing the treatment of historical facts in any other case."** Id.

And certainly it must be this way. Otherwise, what is the point of having a jury? And, how are the typical kinds of fact disputes that accompany these legal questions going to be resolved?

The majority opinion recites a version of the facts that simply was not agreed to by the jury. In the appellate context, the jury's verdict should have some meaning. And, the appropriate approach is that described by the Tenth Circuit in Saye; that is, the "historical facts" (or the history of factual events) should be reviewed in the traditional manner, in the best light for the plaintiff.

Rather than doing this, the majority found its own facts, in some instances by reaching back into the discovery record (rather than the trial record). For example, at p. 28 the majority states that in his deposition Koch revealed that he compiled a list of alleged improprieties on the part of city officials which he hoped to reveal in his litigation. This statement is made to support a holding by the majority that Koch was not acting with a motive to inform the public.

A review of Koch's deposition testimony, however, reveals that he was being questioned about a news article in 1980--a year after the events at issue in the case. And at that point he was embroiled in state court litigation and disputing with the City. In that context, indicated he had information about misconduct by city officials which did not pertain to the fire at issue or to his employment. This sliver of testimony from

his deposition had nothing to do with his motive in finding aggravated arson or in trying to have the arsonist identified and prosecuted. And, even if he was compiling a list of misconduct by city officials, those matters themselves would be matters of public concern. They had nothing to do with some personal personnel dispute between Koch and the City. They had, rather, to do with the performance of duties by elected officials and their appointees.

The trial record indicates that Koch testified that from at least May 18 through July 23 he was trying to get O'Sullivan, Maudlin and Toland (with the help of Jones and Pyle) to find and prosecute the arsonist. And, he was trying to explain to their satisfaction his aggravated arson finding. There is no evidence at all that he was trying to compile a list of misdeeds to use in some personal dispute with the City or County. And, even by respondents'

version of the facts, from May 18 through July 23, Koch was trying to have someone prosecuted for arson because he was emotionally involved in the case and felt something ought to be done. The only conclusion that can be drawn is that Koch's motive was to inspire government officials to do their duties; and, Koch's motive was to let everyone know that the fire was caused by arson and that something should be done about it. These facts are all ignored by the majority, as though they did not exist. How can a fair review--whether it is called "independent", "constitutional", "de novo", or otherwise--be conducted by a court that completely ignores whole bodies of evidence, and completely ignores one party's side of the case?

This is but one example of the majority's improper retrying of the facts, to reach an improper or unsound conclusion. The majority's position that it can retry

all underlying facts is inconsistent with other cases within the Tenth Circuit, including Saye. It is an issue which should be resolved by this Court. This Court should state whether it intends, when instructing lower courts to review the record and make an independent constitutional judgment about whether the speech is protected, it intends for appellate courts to ignore facts that favor the plaintiff's side, fully adopt the defendants' version of the facts, and ignore jury findings on the facts. It is contrary to our system of jurisprudence to take broad categories of garden variety fact disputes and remove them from the jury.

II. The Majority Improperly Conducted The Pickering Balance In This Case Because: (A) That Issue Was Never Raised And Such Balancing Was Never Requested By Respondents Before The Trial Court Until After The Jury's Verdict; (B) The Pickering Balancing Should Not Have Been Conducted In The Absence Of A Concession By

Respondents That Petitioner's Speech Was The Substantial Or Motivating Factor In His Demotion; (C) By Balancing In Favor Of Respondents Because: (i) In Doing So The Court Retried The "Historic Facts"; (ii) In Doing So The Court Placed Undue Significance On The Fact That Petitioner's Speech Was Done In The Context Of An Official Report; And, (iii) In Doing So The Court Found That Conduct Other Than Petitioner's Speech Was Disruptive And Justified Respondents Demoting Petitioner, Whereas Pickering Requires That The Speech Itself Be Inherently Disruptive Before The Employer Can Restrict The Speech.

The majority, at n. 14, p. 13, held that it was proper for the court to conduct the Pickering balancing even though it was not raised by respondents until after the jury verdict; even though the trial court's directed verdict was not on that issue and the City did not cross-appeal; and, even though in granting rehearing en banc, the court only stated it was rehearing the protected speech issue.

While petitioner recognizes that--like the protected speech issue--the Pickering

balancing can be reviewed anew by an appellate court, petitioner submits that it must be properly and timely raised before any review should be done. All through the trial, and indeed all through the appeal, the City has contended that Koch was not demoted because of his speech. Rather, and pursuant to the Mt. Healthy framework, the City has contended that Koch was demoted for other misconduct. After that position failed with a jury, the City pretended to change positions. Then the City began talking about Pickering and its right to have a balancing under that case. It is improper for the majority to let respondents switch horses in the middle of the stream this way.

Worse yet, the nature of the City's position still does not entitle them to a Pickering balancing. As the dissent notes, only when the speech is alleged to be inherently disruptive does Pickering kick in. And, a fortiori, before a defendant

can claim that it had to demote an employee because his speech was too disruptive, that defendant must concede that the employee was demoted because of the speech. The City has never made that concession; therefore, the City is not entitled to the Pickering balancing. Instead, the City has claimed that Koch's speech--that the fire was aggravated arson--had nothing to do with Koch's demotion. That, instead, they had a legitimate reason for his demotion, i.e., his uncooperativeness, his withholding or concealing of evidence, his belligerence, and so forth. It is very typical in any kind of an employment/discrimination case for the employer to claim a legitimate reason for the adverse employment action. That alleged legitimate reason was rejected by the jury, and that should be the end of the so-called "disruptive" claim by the City.

In finding that the balancing tipped against Koch, the majority relied heavily

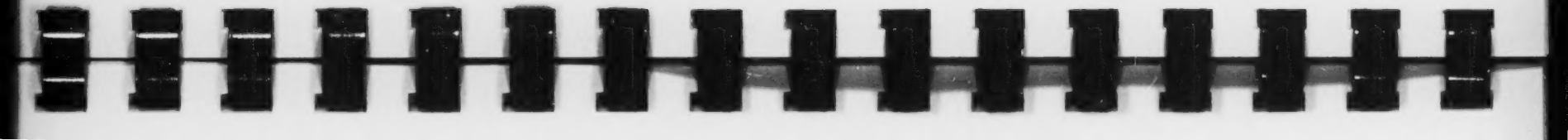
upon the fact that the speech was included in an official report. Discussion of the impropriety of this ruling is found at Issue III below. The majority also tipped the balance against Koch by retrying the facts. The impropriety of that ruling is discussed at Issue I above. The majority also tipped the balance against Koch by finding that his actions were disruptive. As discussed earlier, in doing so, the majority adopted in general terms the version of the facts offered by the City, that is, that Koch lied about the gas valve report, hid the gas valve report, refused to cooperate with representatives of other law enforcement agencies, disobeyed direct orders from Jones, and so forth.

In Pickering this Court held that if speech was inherently disruptive, the employee was not entitled to protection from retaliation for that speech. In Pickering the employer was claiming that the employee's speech--criticizing the

Board's allocation of school funds between education and athletic programs--was itself disruptive. The school board was contending that Pickering was not honest in his statements, and was not responsible in presenting his statements to the public. This Court found that his relationship with the board was not so close that he owed them personal loyalty and confidence. And, more importantly, this Court found that the statements were not the kinds of statements that normally, and inherently, would disrupt the work place. For example, the Court noted that Pickering's accusations could not "be regarded as per se detrimental to the district's schools" but instead "reflect[ed] a difference of opinion between Pickering and the Board" on the issues; and, that certain statements by Pickering, even if false, "would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board". Pickering, supra, 391 U.S. at 570.

Applying that reasoning here, there is nothing about a finding of aggravated arson that would per se disrupt the functioning of the fire department, police department, or County Attorney's office in Hutchinson. Nor is there anything about that finding that would per se disrupt Koch's working relationship with those agencies or his subordinates or superiors. It just happened in this instance that it made O'Sullivan mad, because he did not agree with the finding, and did not want to find or prosecute an arsonist. Just like in Rankin, when the employer did not like the content of the employee's statements. There was nothing, as this Court found, inherently disruptive about what she said in her job circumstances.

Rather than properly balancing Pickering considerations, the majority confused the balancing process there (which addresses the concept of disruption), with the claimed legitimate basis for Koch's



demotion, part of the Mt. Healthy process (which happened to include the concept of disruption). The majority glided from one concept to the other, and confused the matter terribly. In the absence of a finding that the speech itself was inherently disruptive, it was error for the majority to conclude that the balancing should tip against Koch.

III. The Majority In Fact Improperly Made A Per Se Rule That Speech Made As Part Of Official Duties Or Included In Official Reports Is Not Protected; Or, If This Court Agrees That No Such Per Se Rule Was In Fact Established, The Majority Erred In Placing Undue Significance On That Factor And Balancing That Factor Against Petitioner; Or In Making A Rule That That Factor Should Always Be Balanced Against The Employee.

In Pickering v. Board of Education, 391 U.S. 563 (1968), Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), and Connick v. Myers, 461 U.S. 138 (1983), this Court established two exceptions to

the rule that speech of a public employee is afforded first amendment protection. The speech is not constitutionally protected (1) unless it relates to a matter of public concern or (2) unless the speaker's right outweighs the state's right to control its employees. See, e.g., Wren v. Spurlock, 798 F.2d 1313, 1317 (10th Cir. 1986).

The majority has improperly added a third exception. The majority has held, as a practical matter, that if the speech is included in an official report, it is not protected. The majority had no authority to add this exception; and, this third exception is contrary to well established law of this Court.

The majority says that it is not establishing a per se rule, or third exception. But, the majority goes on to say that significant weight should be given to this factor; and, indeed, in tipping the balance under Pickering against Koch, the

majority relies primarily on the fact that the speech was included in an official report. In other words, in this case, per se, because the speech was in an official report, Koch lost.

Even if a clear third exception has not been improperly created by the majority in the Tenth Circuit, the majority unreasonably placed undue and negative significance on this factor. As the dissent asks, why would the presumption be against the employee when the speech is in an official report? And, why does the fact that the speech appears in an official report render it less important to the public's assessment of the performance of duties by government officials? And, why would the government have less interest in protecting speakers in official reports, than out? As one of the dissenters questioned at rehearing en banc, if Koch had made the exact same statement in a letter to the editor of the Hutchinson

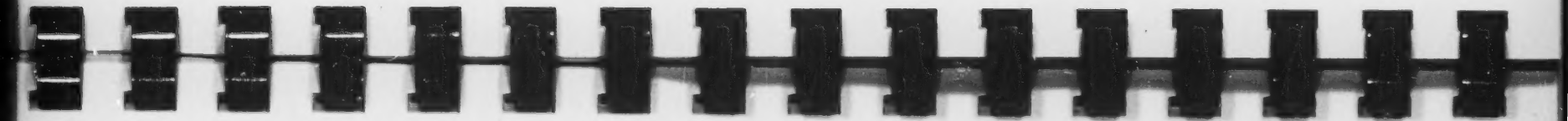
newspaper, would protecting it there--but not in the official report--be logical? There is simply no rhyme or reason to treating the statement differently when it is in an official report.

On rehearing en banc, counsel for amicus argued that since there are thousands of government reports written daily, if the Court did not rule that speech in official reports was unprotected, the floodgates would open and litigation would increase in this area. However, this is not true; because, Koch was not asking for a per se rule that speech in official reports was automatically protected. Any speech--whether in official reports or otherwise--must pass the non-disruptive and public concern threshold. Of these thousands of reports written, a very finite number will be of public concern like the report here was. With due respect, there are already enough barriers to lawsuits for injured plaintiffs; there is no need for

the majority to go out of its way to create another.

If the speech is disruptive--whether it is in an official report or not--government employers already have protection from that disruption, under this Court's rulings, in at least two ways. First, they can claim--and prove--that the speech was inherently disruptive. If so, they are protected, with or without the package of an official report. Second, they can claim--and prove (as the City attempted and failed to do)--that the actions of the employee other than the speech (whether surrounding the speech, at the same time as the speech, or totally disconnected from the speech), was disruptive, and therefore improper, and therefore properly punishable. Why does the majority feel compelled to create a third exception, and give the government employer an additional reason for protection?

As the dissent notes, there is no sound rationale for treating this factor as a negative factor. If anything, the opposite should be true. This Court should find that speech in an official report is entitled to more protection, not less. It is important for the proper functioning of the government that persons with the responsibility of making official reports--with the obvious purpose of having an accurate record of events within government business--be free to speak truthfully in those reports, whether it makes someone angry or not. And they should feel free to do so, without fear of retaliation which will go unpunished. As one of the dissenters pointed out at rehearing en banc, suppose a famous person died of AIDS; and his superior (at the urging of the family of the deceased), told the coroner that if he stated in the death certificate that the cause of death was AIDS he would be fired. Why should this person not be



protected? Isn't the fact that this person died of AIDS of public concern in this day and age? These kinds of questions illustrate the irrationality of the majority's holding.

The majority has created a category of speech which will be unprotected, without a sound basis for doing so, and contrary to the rulings of this Court.

IV. The Majority Erred In Finding That Petitioner's Speech -- Made In An Official Report And Constituting A Finding That A Fire Which Resulted In The Death Of An Unattended Small Child Was The Result Of Arson -- Was Not A Matter Of Public Concern, And Therefore Not Protected As A Matter Of Law.

Aside from the specific points of error addressed above, petitioner submits that the majority's holding, that this speech was not protected, is wrong. This is not a case like Connick, where Koch was involved in some personal fight with his employer, and was using his duty to write a

report about the fire to help in that dispute. All of the evidence illustrates that Koch's relationship with his employer was smooth; and that his relationship with the other law enforcement agencies was good. He had been in the job for over 3 years, and with the department for 19 years. The fact that the following year, when he was in litigation with the City, some news article said that Koch popped off his mouth in the heat of anger about other things these officials had done wrong, has nothing to do with the context of Koch's speech in 1979.

The record illustrates that the "content, form and context" of Koch's speech was the first aggravated arson case in Hutchinson; the death of a 2-year-old child; press attention on the case <u>not</u> initiated by Koch; a strong split of views within the ranks of the officials with experience and knowledge to speak to the cause of the fire; and efforts by Koch to

have the aggravated arson, and death of a small child, investigated. It should be obvious that the opinion of the local fire marshal, after investigating the fire, of the cause of the death of a 2-year-old child, would be a question of public interest. And, it should be obvious that the manner in which other law enforcement agencies react to that finding, is a matter of a public concern. It is certainly relevant to the public's assessment of how elected officials do their job to see how they handle a finding of aggravated arson. Here, they handled it wrong. Rather than seeking the perpetrator, they turned on Koch, and punished him for his finding. There is no evidence that he made his finding with some ulterior motive. There is no evidence that he did anything after he reached that conclusion but try to get other law enforcement agencies to find the arsonist, and try to get the County Attorney to prosecute the arsonist. This

is a classic example of speech which is of public concern. The "content, form and context" of the statement illustrates that this entire matter was of public interest. Whether or not the public actually knew of Koch's report, or actually knew of the inner-disputing about the cause of the fire, the fact is that this speech, if known to the public, would sufficiently inform them on the question of how elected officials were doing their duties. Koch conducted himself properly. And, he was punished because he would not change his report. The majority erred in finding that this speech was not a matter of public concern.

CONCLUSION

Petitioner submits that the majority made several serious mistakes in its analysis and holding. First, the majority improperly retried the historical facts,

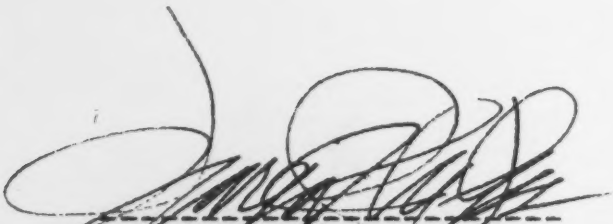
rendering the jury's verdict, after a 3-week trial, meaningless. Second, the majority improperly balanced under Pickering by allowing the City to raise the issue untimely, and by treating the claimed legitimate basis for demotion as the kind of disruption necessary under Pickering. The majority did not find that the speech of Koch was disruptive, or inherently disruptive. Therefore, the majority should not have tipped the balance against Koch. Third, the majority improperly established a third exception to first amendment protection to the speech of government employees. The majority found that if speech was included in an official report it would, per se, be unprotected. Although the majority claims not to have made this finding, the majority in fact did so because of the weight placed on that factor. And, even if the majority did not create a third exception, it placed undue and negative significance on this factor.

Fourth, the majority improperly concluded that the speech here--that the fire at issue resulted from aggravated arson--was not a matter of public concern, and not protected as a matter of law. For these reasons, the writ should issue, the majority opinion should be examined, and reversed.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT** have been served upon the following counsel of record by placing same in the United States Mail, properly addressed and postage prepaid, on the 26th day of August, 1988: Mr. Robert L. Howard, Esq., 700 Fourth Financial Center, Wichita, Kansas 67202; Mr. Philip H. Alexander, Esq., Post Office Box 1567, 125 E. Ave. B, Hutchinson, Kansas 67501; and, Mr. James M. Kaup, Esq.,

General Counsel, League of Kansas Municipalities, 112 W. 7th St., Topeka, Kansas 66603.



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